Supreme Court, U.S.
FILED

No. 051188 FEB 15 2006

OFFICE OF THE CLERK

In The

Supreme Court of the United States

MORETON ROLLESTON, JR. LIVING TRUST,

Petitioner,

v.

ESTATE OF REBECCA WIGHT CHERRY SIMS,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Georgia

PETITION FOR WRIT OF CERTIORARI

MORETON ROLLESTON, JR.
Attorney for Petitioner
Georgia Bar No. 613700
2180 Garraux Road, N.W.
Atlanta, Georgia 30327
404/906-7098

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

No. One

Whether the Sheriff of Fulton County, in Atlanta, Georgia illegally evicted the Trustee of the Moreton Rolleston, Jr. Living Trust (appellant) in violation of the eviction laws of State of Georgia, namely, O.C.G.A. 44-11-30 and 44-11-32.

No. Two

Whether the eviction of the Trust and of Rolleston, the Trustee of the appellant, was illegal and violated the Fourth Amendment of the U.S. Constitution.

OPINION BELOW

"Upon consideration of the petition for writ of certiorari as amended, the same is hereby denied. Petitioner's request for injunctive relief is also denied. It is further ordered that upon receipt of the remittitur, the trial court shall assess against the petitioner and in favor of the respondent, a penalty for frivolous appeal in the amount of $2500, to be paid within 30 days of the trial court's order."

In Georgia Supreme Court Case No. SO5A 1899 and SO5A 1900. Subject of certiorari was the case in the Georgia Court of Appeals A05A 1645.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment of the U.S. Constitution provides in relevant part: "No person shall be . . . deprived of . . . property without due process of law."

REASONS FOR GRANTING THE PETITION

Question No. One

The defendant Estate (hereinafter Estate) asked the Sheriff of Fulton County, Ga. to evict the plaintiff Trust (hereinafter Trust) from the house and 18 acres of land

which was the home of Moreton Rolleston, Jr. (hereinafter Rolleston home).

The eviction was illegal because the Sheriff and the Cherry Estate did not comply with OCGA 44-11-30 because (1) the Cherry Estate did not present an affidavit demanding possession and (2) Rolleston did give the Sheriff Banner his affidavit in which he claimed legal right to possession of Rolleston's home (address of which is 2035 Garraux Road, N.W., Atlanta, Georgia 30327).

The Cherry Estate did not comply with the law. Rolleston did comply. Rolleston has been entitled to possession of 2035 Garraux since November 1, 2003.

The applicable statute which Cherry and Sheriff Banner violated reads as follows:

> "OCGA 44-11-30. Manner of ejecting intruders; affidavit, ejection by sheriff; counter affidavit."
>
> When any person, either by himself, his agent, or his attorney in fact, shall take and subscribe an affidavit in writing before any officer authorized to administer an oath setting forth that he claims, in good faith, the right of possession to the described land or tenement and that such land or tenement is in the hands of another named person who does not in good faith claim a right to such possession and yet refuses to abandon the same, it shall be the duty of the sheriff of the county where the land or tenement is located, upon receiving such affidavit, to exhibit such affidavit to the person described as being in possession of such land or tenement at the earliest possible date and to turn such person out of possession unless the person in possession tenders to the sheriff a counter affidavit stating that he

claims in good faith, a legal right to the possession of the land or tenement. (Ga. L 1853-54, p. 52, § 1; Code 1863, § 3979; Code 1868, § 4000, Code 1873, § 4072; Code 1882, § 4072; Civil Code 1895, § 4808; Civil Code 1910, § 5380; Code 1933, § 105-1501.)"

"44-11-32. Procedure on submission of counter affidavit; trial.

If the party in possession submits a counter affidavit as provided in Code Section 44-11-30, the sheriff shall not turn him out of possession but shall leave both parties in their respective positions. In such an event, the sheriff shall return both affidavits to the office of the clerk of the superior court of the county in which the land is located for a trial of the issue before a jury in accordance with the laws of this state. (Ga. L 1853-54, p. 52, § 1; Code 1863, § 3981; Code 1868, § 4002, Code 1873, § 4074; Code 1882, § 4074; Civil Code 1895, § 4810; Civil Code 1910, § 5382; Code 1933, § 105-1503.)"

The Trustee is Moreton Rolleston, Jr.

The site of the eviction was the home of Moreton Rolleston, Jr. and had been for 33 years. Address was 2035 Garraux Road, N.W., Atlanta, Ga. 30327. Rolleston's home was on 18 acres of land.

Question No. Two

The eviction of the Trust and of Rolleston, the Trustee of the appellant, was illegal and violated the Fourth Amendment of the U.S. Constitution.

In case No. 04-1067 STATE OF GEORGIA, PETITIONER VS. SCOTT FITZ RANDOLPH, the Supreme Court of the United States issued an opinion which supports the position of the Trust in the instant case because the Trustee (Rolleston) tendered to the Fulton County Sheriff an affidavit which stated that he claimed in good faith a legal right to the possession of Rolleston's home as described herein. A copy of said affidavit is attached as Exhibit "A" hereto.

Sheriff Banner acknowledged receipt of Rolleston's affidavit in Exhibit "B" hereto, dated November 1, 2003.

MORETON ROLLESTON, JR.
Attorney for Petitioner
Georgia Bar No. 613700
2180 Garraux Road, N.W.
Atlanta, Georgia 30327
404/906-7098

EXHIBIT "A"

AFFIDAVIT OF MORETON ROLLESTON, JR.

Moreton Rolleston, Jr., who having personally appeared before the undersigned officer, duly authorized by law to administer oaths, having been first duly sworn according to law, deposes and states the following:

1.

I voluntarily and freely make this affidavit of my own personal knowledge.

2.

I am over the age of 21, am suffering from no legal disability, and am competent and authorized to make this affidavit and testify to the statements and facts contained herein.

3.

The information contained in this affidavit was obtained from my own personal knowledge.

4.

All the facts set forth herein are true and correct.

5.

In accordance with Official Code of Georgia 44-11-30, I, as Trustee of the Moreton Rolleston, Jr. Living Trust, state that I, in good faith, claim a legal right to the possession of property known as 2035 Garraux Road, N.W.,

Atlanta, Georgia 30327 and all land surrounding said house known as 2035 Garraux Road, said surrounding land consisting of approximately 18 acres. I have lived in this house since May 1962. In 1995 I transferred this house and all land to Moreton Rolleston, Jr. Living Trust by deed which is recorded. I am the only Trustee of this trust. I am in possession of the house and surrounding 18 acres.

This 15th day of October, 2003.

/s/ Moreton Rolleston
Moreton Rolleston, Jr.

Sworn to and subscribed before me
on this 15th day of October, 2003.

/s/ Ann S. Cagle
Notary Public

[Stamp]

Notary Public, Cobb County, Georgia.
My Commission Expires Jan. 29, 2004

EXHIBIT "B"

~~The undersigned is an officer of the Sheriff Department of Fulton County, Georgia and has served Moreton Rolleston, Jr. with an affidavit of~~ _____ ~~claiming possession of 2035 Garraux Road, N.W., Atlanta, Georgia~~. I hereby acknowledge receipt of the foregoing affidavit by Rolleston ~~immediately after I served the affidavit on Rolleston~~.

This 1 day of ~~October~~ Nov., 2003.

_____

Sheriff, badge No. _____

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MORETON ROLLESTON, JR. LIVING TRUST,

Petitioner,

v.

ESTATE OF REBECCA WIGHT CHERRY SIMS,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Georgia

SUPPLEMENTAL APPENDIX

MORETON ROLLESTON, JR.
Attorney for Petitioner
Georgia Bar No. 613700
2180 Garraux Road, N.W.
Atlanta, Georgia 30327
404/906-7098

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COURT OF APPEALS OF GEORGIA

Court of Appeals
of the State of Georgia

[Seal] I hereby certify this opinion is a true and complete copy of the opinion of The Court of Appeals of Georgia.

Date: 3/2/06

Signature: /s/ William L. Martin III

Clerk, Court of Appeals of Georgia

WITNESS MY SIGNATURE AND SEAL OF THE COURT OF APPEALS OF GEORGIA

ATLANTA, September 15, 2005

The Court of Appeals hereby passes the following order:

A05A1645. MORETON ROLLESTON, JR. LIVING TRUST v. ESTATE OF REBECCA WIGHT CHERRY SIMS.

Moreton Rolleston, Jr., Living Trust filed this action in the Superior Court of Cobb County challenging the validity of a sheriff's sale of property owned by its trustee, Moreton Rolleston, Jr. The Trust sued the purchaser of the property, the Estate of Rebecca Wight Cherry Sims. The Estate moved to transfer the case to the Superior Court of Fulton County, where the property its located. The Cobb County court granted the motion, and the Trust filed a notice of appeal from the transfer order.

The Estate moved to strike the notice of appeal, arguing that the transfer order was not a final, appealable order and that the Trust had not followed the required procedures for an interlocutory appeal. The Fulton County court granted the Estate's motion and dismissed the Trust's appeal. The Trust then filed a notice of appeal from

that order. The notice of appeal was directed to the Supreme Court, which transferred the appeal to this court on the grounds that it lacked jurisdiction. The Estate has filed a motion to dismiss the appeal, and we now grant that motion.

With certain exceptions not applicable here, direct appeals may be taken to this court only from "final judgments, that is to say, where the case is no longer pending in the court below." OCGA § 5-6-34(a)(1); see also *Yeazel v. Burger King Corp.,* 236 Ga. App. 110 (511 SE2d 237) (1999). An order transferring a case from one superior court to another "is not a final judgment as the case is still pending in the court below, albeit a different court from the one ordering the transfer." *Griffith v. Georgia Board of Dentistry,* 175 Ga. App. 533 (333 SE2d 647) (1985); see also *Patel v. Georgia Power Co.,* 234 Ga. App. 141, 142(2) (505 SE2d 787) (1998); *Wright v. Millines,* 212 Ga. App. 453, 454 (442 SE2d 304) (1994). "The order is thus interlocutory and not appealable without a certificate of immediate review from the lower court and an appropriate application to this court." *Griffith,* supra; see also OCGA § 5-6-34(b).

The Trust neither sought nor obtained a certificate of immediate review from the lower court to appeal the transfer order. Accordingly, its appeal from the transfer order was premature, and the trial court properly dismissed it. See *Sommers v. State Compensation Ins. Fund,* 229 Ga. App. 352, 353(2) (494 SE2d 82) (1997). The Trust now attempts to appeal that dismissal order – again, without seeking a certificate of immediate review. Thus, the Trust is trying to do indirectly what the trial court properly refused to permit it to do directly – seek an interlocutory appeal of the transfer order without following

interlocutory appeal procedures. Because we lack jurisdiction to consider a direct appeal of a transfer order, we hereby dismiss this appeal.

The Trust and Rolleston have been frequent litigants in this court and the Supreme Court. See, e.g., *Moreton Rolleston, Jr., Living Trust v. Kennedy,* 277 Ga. 541 (591 SE2d 834) (2004); *Cherry v. Coast House, Ltd.,* 257 Ga. 403 (359 SE2d 904) (1987); *Cherry v. Moreton Rolleston, Jr. Living Trust,* ___ Ga. App. ___ (Case No. A05A1512, decided June 22, 2005); *Rolleston v. Estate of Sims,* 253 Ga. App. 182 (558 SE2d 411) (2001); *Rolleston v. Cherry,* 237 Ga. App. 733 (521 SE2d 1) (1999); *Rolleston v. Cherry,* 233 Ga. App. 295 (504 SE2d 504) (1998); *Rolleston v. Cherry,* 226 Ga. App. 750 (487 SE2d 354) (1997). On at least one previous occasion, the Trust and Rolleston attempted to appeal another interlocutory order without first obtaining a certificate of immediate review. *Rolleston v. Cherry,* supra, 233 Ga. App. at 296. Two judges on the panel in that case recommended the imposition of a penalty for frivolous appeal, but no penalty was imposed. Id. at 296.

The law is clear that no direct appeal is possible under the circumstances presented here. Moreover, given their experience with the appellate process and their previous filing of a similarly groundless appeal against the same appellee as in this case, the Trust and Rolleston had no "reasonable basis to anticipate reversal" of the trial court's dismissal order. See *In the Interest of A. W.,* 242 Ga. App. 26, 29 (528 SE2d 819) (2000). This appeal is unmistakably frivolous. Accordingly, we exercise our discretion under Court of Appeals Rule 15(b) and hereby impose a $1,000 penalty for the filing of a frivolous appeal.

Although the notice of appeal was filed in the name of the Trust only, the trial court made Rolleston, personally, a party-plaintiff in this action. Thus, the $1,000 penalty is imposed against both the Trust and Rolleston, jointly. The penalty shall constitute a money judgment in favor of appellee, the Estate of Rebecca Wight Cherry Sims, as set forth in Rule 15(c).

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta SEP 15 2005

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ William L. Martin III,
Clerk.

In the Supreme Court of Georgia

Decided: November 21, 2005

S05A1899, S05A1900. MORETON ROLLESTON, JR., LIVING TRUST v. ESTATE of REBECCA WIGHT RANDOLPH CHERRY SIMS et al. (two cases)

CARLEY, Justice.

These two cases arise from the latest in a long series of lawsuits related to the collection of a judgment entered in favor of the Estate of Rebecca Wight Randolph Cherry Sims (Estate) against Moreton Rolleston. See *Moreton Rolleston, Jr., Living Trust v. Kennedy,* 277 Ga. 541 (591 SE2d 834) (2004). Here, as in the previous actions, the Moreton Rolleston, Jr., Living Trust (Trust) claims that real property is not subject to levy because title is held by it, rather than by Rolleston individually. After filing this action against the Estate and its executor, the Trust moved for default judgment. The trial court denied the motion and, in Case Number S05A1899, the Trust has filed a direct appeal from that order. Subsequently, the trial court dismissed the Trust's complaint with prejudice, concluding that the suit was barred by the principle of res judicata and that the claim lacked a justiciable basis in fact or law, was utterly vexatious and frivolous, and was brought for an improper purpose. In Case Number S05A1900, the Trust appeals from that order, The two cases are hereby consolidated for disposition in this single opinion.

CASE NUMBER S05A1899

1. Denial of a motion for default judgment is an interlocutory ruling which cannot be appealed directly. *Ware v. Handy Storage,* 222 Ga. App. 339 (474 SE2d 240)

(1996). Accordingly, this case is hereby dismissed and, pursuant to Rule 6 of this Court, a $2500 penalty for filing a frivolous appeal is imposed against the Trust and its attorney.

CASE NUMBER S05A1900

2. The trial court correctly determined that all issues raised in this action were conclusively resolved against the Trust and in favor of the Estate by the rulings in previous actions. See *Morton Rolleston, Jr., Living Trust v. Kennedy,* supra. Accordingly, the dismissal of the complaint is affirmed and, pursuant to Rule 6 of this Court, an additional $2500 frivolous appeal penalty is imposed against the Trust and its attorney.

Appeal dismissed and penalty imposed in Case Number S05A1899. Judgment affirmed and penalty imposed in Case Number S05A1900. All Justices concur, except Sears, C. J., who concurs specially.

S05A1899, S05A1900. MORETON ROLLESTON, JR., LIVING TRUST v. ESTATE of REBECCA WIGHT RANDOLPH CHERRY SIMS et al. (two cases)

SEARS, Chief Justice, concurring specially.

Moreton Rolleston fully deserves the sanctions imposed by the majority in this case, as his frivolous and reprehensible conduct has caused needless hardship for his opponents in this litigation. In my opinion, however, Rolleston has also disgraced the legal profession generally, and has thereby forfeited the privilege of practicing law in

this State. Accordingly, this Court should utilize its inherent authority to order that he be disbarred.

SUPREME COURT OF THE STATE OF GEORGIA
CLERK'S OFFICE, ATLANTA

MAR 02 2006

I hereby certify that the foregoing pages hereto attached contain a true and complete copy of the opinion of the Supreme Court of Georgia in the case therein stated, as appears from the original of file in this office.

[SEAL] Witness my signature and seal of the said Court hereto affixed the day and year above written.

/s/ Sherie M. Welch Clerk

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

MORETON ROLLESTON, JR., LIVING TRUST,
And MORETON ROLLESTON, JR.,

Plaintiffs,

Vs. **Civil Action 2004 CV 91891**

ESTATE OF REBECCA WIGHT CHERRY SIMS,
JOHN RANDOLPH CHERRY, EXECUTOR,

Defendant.

ORDER DISMISSING PLAINTIFFS' APPEAL AND SETTING BRIEFING SCHEDULE

(Filed Feb. 10, 2005)

This matter is pending before the Court for consideration of the plaintiffs' pending notice of appeal and the defendant's motion to strike that notice of appeal. The case was initially filed in the Superior Court of Cobb County. On September 15, 2004, that Court entered an Order transferring the case to the Superior Court of Fulton County. Plaintiff Moreton Rolleston filed a notice of appeal on behalf of the Moreton Rolleston, Jr., Living Trust on September 28, 2004. In response, the defendant filed a motion asking the Court to strike the plaintiffs' notice of appeal.

The plaintiffs argue that the Superior Courts (both Cobb Superior and Fulton Superior) lost jurisdiction over this matter due to the fact that a notice of appeal was filed. The plaintiffs argue that this Court lacks the authority to take any further actions in this case whatsoever until such time as the appellate process is complete. The defendant contends that the order of transfer was not a

final order, that the notice of appeal was accordingly premature, and that this Court has the authority to strike such a premature notice of appeal.

An order transferring a case to another Superior Court does not resolve all the claims as to all the parties and, accordingly, is not a final, appealable order within the meaning of O.C.G.A. §5-6-34(a)(1). *Patel v. Georgia Power Co.*, 234 Ga. App. 141, 142 (1998); *Wright v. Millines*, 212 Ga. App. 453, 453-54 (1994); *Griffith v. Georgia Board of Dentistry*, 175 Ga. App. 533, 534 (1985). Because the order was not final in nature it could only be appealed through the procedures designated for interlocutory appeals under O.C.G.A. §5-6-34(b).

Ordinarily a Superior Court loses jurisdiction to take further action in a matter after a notice of appeal is filed. *See, e.g., Fulton Paper Co. v. Reeves*, 212 Ga. App. 314, 315 (1994); *Philips Broadcast Equipment Corp. v. Production 70's, Inc.*, 133 Ga. App. 765, 766 (1975). There are a few narrow exceptions to this general rule, however. One such exception authorizes the Court to dismiss a premature notice of appeal from a nonfinal order. *See Jones v. Singleton*, 253 Ga. 41, 42 (1984); *Sommers v. State Compensation Ins. Fund*, 229 Ga. App. 352, 353 (1997); *compare Castleberry's Food Co. v. Smith*, 205 Ga. App. 859, 860 (1992). Under the circumstances presented, it is clear that the plaintiffs' appeal was taken from a nonfinal order and is accordingly subject to dismissal. The plaintiffs' appeal is therefore hereby DISMISSED. Once a final order is entered in this matter "each party would have the right to place the entire matter before the [appropriate appellate] Court.'" *Jones*, 253 Ga. at 41.

Other motions currently pending appear to be the motion for summary judgment filed by plaintiff Moreton Rolleston, Jr., Living Trust and the motion to dismiss filed by the defendant. The Court finds that in light of the fact that extensive materials outside of the pleadings are being proffered to the Court for consideration, it is not appropriate to treat the defendant's motion as a motion to dismiss. It shall instead be converted into a motion for summary judgment. O.C.G.A. §9-11-12(b); *Bays v. River Oaks Constr.*, 244 Ga. App. 401, 402 (2000). Any further exhibits, affidavits, or argument that either party wishes to present regarding the cross-motions for summary judgment must be filed within thirty (30) days following entry of this Order.[1] Each party may thereafter have fifteen (15) days to submit additional argument in response to the other party's prior submission, In their submissions the parties should address both the claims brought by the plaintiffs and the counterclaims brought by the defendant. The Court will take the motions under advisement forty-five (45) days following the entry of this Order.

SO ORDERED, this 10 day of February, 2005.

/s/ Bensonetta Tipton Lane
BENSONETTA TIPTON LANE, JUDGE
Fulton Superior Court
Atlanta Judicial Circuit

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[1] Defendant's counsel is cautioned that she cannot serve as both counsel and witness in this litigation. Georgia Rule of Professional Conduct 3.7(a). She must either establish any evidence supporting the defendant's case through other witnesses or withdraw as defendant's counsel.

Copies to:

Ms. Shelby A. Outlaw
The Outlaw Firm
315 Sycamore St.
Decatur, GA 30030-3436
Phone: 404-371-9588
Fax: 404-371-9715

Mr. Moreton Rolleston Jr.
2180 Garraux Road N.W.
Atlanta, GA 30327-2507
Phone: 404-906-7098